

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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77-2047

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN H. MONE,

Petitioner-Appellee,

v.

CARL ROBINSON, WARDEN, CONNECTICUT
CORRECTIONAL INSTITUTION AT SOMERS,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RESPONDENT-APPELLANT'S BRIEF

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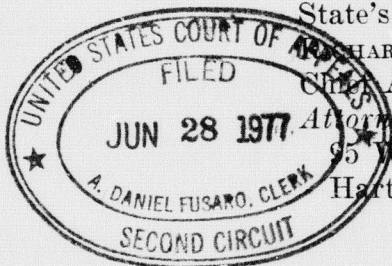


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Issues Presented

Was the petitioner prejudiced, in state court proceedings involving a felony guilty plea and subsequent sentencing, by the fact that he and his codefendant wife were represented by the same attorney?

Statement of the Case

This appeal arises from an order of the District Court granting a writ of habeas corpus on behalf of a state prisoner held in custody by the respondent, an official of the Connecticut Department of Correction.

The petitioner has been confined in execution of an imposed sentence of not less than nine nor more than twenty years for the crime of conspiracy to commit kidnapping in the second degree. The conviction on that charge was based on a plea of guilty to one count of a three count information. That guilty plea was entered and accepted in the Connecticut Superior Court at Hartford on June 6, 1973, and sentence was imposed on June 28, 1973, with Judge Joseph Dannehy presiding at both proceedings.

Transcripts of the change of plea and sentencing hearings have been made a part of the record in this case. It is quite apparent from those transcripts that the petitioner, who was represented by retained counsel, participated extensively at both hearings. (Tr. #1, pp. 7, 8, 11; see App. pp. A9, 10, 13; Tr. #2, pp. 7, 8; see App. p. A21, 22).¹ After extensive inquiry concerning the various rights waived by a plea of guilty, Judge Dannehy made a specific finding that the plea was entered voluntarily, with full understanding of the offense charged, and after adequate and effective assistance of counsel. (Tr. #1, p. 12; see App. p. A14).

The critical fact relating to the present appeal is the joint representation of petitioner and his codefendant wife by attorney James Egan. The circumstances giving rise to that joint representation were explored in the state habeas corpus trial of March, 1975, and the transcript of that proceeding ("Tr.#3" herein) has also been made a part of the record in this case. It is pertinent to understand that Nanette Mone, petitioner's wife and codefendant, was originally represented by a public defender. (Tr. #3, p. 62; see App. p. A32). Subsequently, at the request of petitioner's parents, Attorney Egan was engaged to represent both defendants. (Tr. #3, p. 73; see App. p.

¹ The transcript of the plea proceeding on June 6, 1973, has been designated Tr.#1, and the transcript of the sentencing proceeding on June 28, 1973, has been designated Tr. #2.

A33). Mr. Egan, now deceased, was a seasoned trial lawyer with substantial experience in litigating criminal matters. (Tr. #3, pp. 130-131; see App. pp. A41-42). If it had not been for the action of petitioner and his parents, Nanette Mone would presumably have continued to be represented by the public defender's office.

The factual background of this case is most unusual in terms of one defendant's interests being in potential conflict with the interests of codefendant. Throughout the proceedings, John Mone, speaking directly to the court, emphasized the *minimal* role of the codefendant, Nanette Mone, and took full responsibility for directing her actions in the enterprise which led to their joint prosecution. See, e.g., Tr. #1, pp. 8, 11; see App. pp. A10, 13. These special circumstances remove this case from the dangers of the typical dual representation situation and at the same time suggest a more difficult analysis of counsel's duty to his client.

ARGUMENT

Joint Representation of Petitioner and His Codefendant Spouse by Retained Counsel Did Not Result in Prejudice to the Petitioner.

Not every case of joint representation results in due process or right to counsel violations. *United States v. Mari*, 526 F.2d 117, 119 (2nd Cir., 1975). It would be illogical to assume that there are no circumstances in which dual representation would actually render assistance of counsel *more* effective for *both* defendants than individual representation. For instance, separate representation might prove less effective in certain highly technical prosecutions in which the expertise of specialized counsel was a major factor. In the absence of a specific showing of prejudice, it cannot be held that dual representation has resulted in the denial of effective assistance of counsel. *United States v. Lovano*, 420 F.2d 769, 773 (2nd Cir., 1970), cert. den. 397 U.S. 1071; *United States v. Carrigan*,

543 F.2d 1053, 1055 (1976); *United States ex rel. Ross v. LaVallee*, 448 F.2d 552, 555 (1971); *United States v. Goldberg*, 401 F.2d 644, 648 (2nd Cir., 1968), cert. den. 393 U.S. 1099; see *Dukes v. Warden*, 406 U.S. 250, 92 S.Ct. 1551, 32 L.Ed.2d 45 (1972). Each case should be examined on its own merits, and any inclination to automatically find right to counsel violations in joint representation cases, without specific analysis of the factors of the case, should be rejected as a disservice to the Sixth Amendment.

The duty of an attorney in a criminal case is to pursue the interest of his client, even if those interests do not necessarily coincide with the minimization of sanctions. A client who wishes to exculpate his codefendant, even at some risk to himself, should be allowed to pursue that interest with the assistance of counsel. An attorney who tried to save his client at the expense of a codefendant, against the stated wishes of the client, would be acting in a disloyal manner to that client. Defendants in criminal cases are capable of goals which presuppose their own guilt, such as restitution, rehabilitation, and exoneration of a codefendant. "For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment." *Brady v. United States*, 397 U.S. 742, 750, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Understanding this range of a criminal defendant's motivations, it is clear that assistance of counsel, and loyalty to client, are not phrases of narrow scope. *Tollett v. Henderson*, 411 U.S. 258, 268, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

A plea of guilty, entered without constitutional infirmity, includes a waiver of all substantive defenses. *McMann v. Richardson*, 397 U.S. 759, 766, 774, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The controlling principle has been summarized as follows: "... constitutional violations occurring in the criminal process which do not exert a causative effect upon the decision to enter a guilty plea are swallowed up by the plea and insulated from collateral attack." *Parker v. Ross*, 470 F.2d 1092, 1096 (4th Cir.,

1972). The pervasive nature of the plea of guilty, and the limitations of subsequent review, have been discussed at length in the recent cases of *Tollett v. Henderson*, supra; *Brady v. United States*, supra; *McMann v. Richardson*, supra; and *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Brady v. United States*, supra, 757.

In the present case, petitioner was most determined that his codefendant wife be treated leniently by the court, as illustrated by the following remarks he addressed to the court on June 6, 1973:

"Your Honor, I again would like to emphasize my wife had absolutely no knowledge of what did take place, and I at this time would very much like to ask the Court if the Court might have mercy to release my wife, to release her clear, because she had nothing whatsoever to do with this. She did only what I asked her to do . . ." Tr.#1, p. 11; see App. p. A13.

This approach by petitioner to the court on behalf of his wife caused a dilemma for counsel. But it was a dilemma which would have existed whether or not petitioner and his wife had separate attorneys. Assuming that these two defendants did have separate representation, and petitioner's counsel had urged the court, for example, to treat his client no more harshly than the codefendant, then would not petitioner have a valid claim, ethical if not also legal, that his attorney transgressed petitioner's desire and strategy to exculpate his spouse. Joint representation

was not at the root of that dilemma, and in fact petitioner probably had more control over the situation by virtue of the joint representation.

Prejudice has not been demonstrated by the record in this case, nor is there support in the record for any claim that the decision not to assert an insanity defense was connected to the fact of joint representation.¹

Conclusion

For the reasons set forth above, the respondent-appellant respectfully submits that the judgment of the District Court should be reversed.

Respectfully submitted,

GEORGE D. STOUGHTON

State's Attorney

RICHARD F. BANBURY

Chief Assistant State's Attorney

Attorneys for Appellant

¹ The successful assertion of an insanity defense would not necessarily have resulted in petitioner's enlargement. See Connecticut General Statutes section 53a-47. Petitioner's counsel did use a psychiatric evaluation of his client in the presentation of mitigating circumstances. (Tr.#2, pp. 4-6; see App. pp. A18-20).

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Respondent-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 27th
day of June, 1977 he served two copies of the
Appellant's Brief
Michael J. DeGregorio, Esq. and Stephen Wizner, Esq. ^{on}

the attorney^s for the Petitioner-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney^s at
No. 27 North Street, Pittsfield, Mass. () N. Y.,
127 Wall Street, New Haven, Conn., respectively
that being the address designated by them for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

28th day of June, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472929
Qualified in New York County
Commission Expires March 30, 1978

